AT&T

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July 13, 1995

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: Ex Parte Presentation
Market Entry and Regulation
of Foreign-Affiliated Entities (IB Docket No. 95-22)

Dear Mr. Caton:

On Thursday, July 13, 1995, Charles F. Meyers, Elaine R. McHale and I discussed issues related to the above-captioned proceeding with the following members of the International Bureau: Diane Cornell, Brian O'Connor, Aileen Pisciotta, Susan O'Connell, Troy Tanner, Maureen McLaughlin, Robert McDonald, Ken Schagrin, and Douglas Galbi. We used the attached materials during the discussion

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a) of the Commission's Rules.

Sincerely,

Jacqueline D. Miller

Jacqueline D. Miller

Attachment

cc: Diane Cornell
Brian O'Connor
Aileen Pisciotta
Susan O'Connell
Troy Tanner
Maureen McLaughlin
Robert McDonald
Ken Schagrin
Douglas Galbi

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THE COMMISSION HAS CORRECTLY IDENTIFIED THE CRITERIA FOR DETERMINING THE EXISTENCE OF EFFECTIVE MARKET ACCESS

The Commission has proposed rules that would consider the following factors, none of which would be dispositive, to determine if effective market access exists:

1. whether U.S. carriers can offer in the foreign country international facilities based services substantially similar to those the foreign carrier seeks to offer in the U.S.;

2. whether competitive safeguards exist in the foreign country to protect against anti-competitive and discriminatory practices;

3. the availability of published, non-discriminatory charges, terms and conditions for interconnection to foreign domestic carriers' facilities for termination and origination of international services;

4. timely and nondiscriminatory disclosure of technical information needed to use or interconnect with carriers' facilities;

5. the protection of carrier and customer proprietary information; and

6. whether an independent regulatory body with fair and transparent procedures is established to enforce competitive safeguards.

THE PRIMARY MARKET(S) OF THE FOREIGN CARRIER SEEKING ENTRY TO THE U.S. SHOULD OFFER EFFECTIVE MARKET ACCESS TO U.S. SERVICE PROVIDERS <u>AT THE TIME OF ENTRY</u>

- The NPRM recognizes that effective market access must exist "at the time of entry, or in the near future." (Paragraph 38)

- Any foreign carrier entry prior to the existence of effective market access handicaps U.S. carriers' ability to compete in the global seamless services market.

- Relying on future events and the development of effective competition based on anticipated developments in foreign markets will unfairly handicap U.S. carriers until such time as effective competition actually exists. Permitting entry prematurely will burden U.S. carriers to an extent, and for a length of time, that cannot be determined in advance. *The Commission should not take any action that competitively handicaps U.S. industry -- to any extent or for any period of time.*

THE COMMISSION SHOULD APPLY ITS EFFECTIVE MARKET ACCESS STANDARD TO TRANSACTIONS INVOLVING ACQUISITIONS BY FOREIGN CARRIERS INVOLVING 10% OR GREATER EQUITY INTEREST IN A U.S. CARRIER

- The NPRM corrrectly limits its focus to investments by foreign carriers because of their ability to skew competition in the U.S. Financial interests of any magnitude can taint the behavior of the investor and bestow benefits on U.S. affiliates.

- A 10% threshold is supported by current FCC policy in another sector and is necessary to protect the U.S. public interest.

- Passive investments, whether by U.S. citizens or foreign citizens, should present no public interest concern in the international services market. In addition, U.S. carriers will have the benefit from the ability to raise capital on the world financial markets, without regard to the nationality of the passive investor.

    - Because of their ability to enter into operating agreements with U.S. carriers and to otherwise affect the financial status of U.S. carriers, foreign monopoly carriers can ***never*** be passive investors in a U.S. carrier.

- In the broadcasting industry, the Commission has limited "passive" investors to investment companies, insurance companies, and bank-trust departments. The Commission limits even "passive" investors under this definition to 10%.

THE EFFECTIVE MARKET ACCESS ("EMA") TEST SHOULD APPLY TO RESALE ENTRY INTO THE U.S.

THE COMMISSION'S EFFECTIVE MARKET ACCESS RULES SHOULD APPLY TO ALL EFFECTIVE ENTRY OPPORTUNITIES IN THE U.S. MARKET. RESALE OF U.S. SERVICES IS EFFECTIVE ENTRY

- U.S. carriers offer feature-rich services with ancillary functions (billing, collection) that can be resold with minimal investments by reseller (e.g., switchless SDN")
- Prices of underlying services and facilities reflect the declining costs of technology, the abundance of capacity and fierce competition
- Resellers enjoy equal access -- 1+ dialing and equal access technical quality makes resale transparent to customers
- Resellers obtain the same 800 number portability benefits as facilities-based carriers

ALL OF THESE BENEFITS MAKE RESALE AS EFFECTIVE A FORM OF ENTRY IN THE U.S. AS FACILITIES-BASED CARRIAGE

RESALE IN NON-U.S. MARKETS DO NOT OFFER THE SAME OPPORTUNITIES AND IT IS NOT AN EFFECTIVE ENTRY VEHICLE IN NON-U.S. MARKETS:

- Foreign carriers generally do not offer feature-rich, software defined services or bulk discount plans for basic switched voice service
- Prices of underlying non-U.S. services reflect monopoly-oriented markets
- Resellers are not entitled to technically equal interconnection to the bottleneck networks of foreign carriers
- Customers of resellers in non-U.S. markets do not have dialing parity with customers of facilities-based carrier in non-U.S. market
- 800 number portability does not exist in any non-U.S. market except Canada

THE PRACTICAL RESULT IS THAT FOREIGN OWNED RESELLERS OF U.S. SERVICES CAN MATCH THE SERVICE PORTFOLIO OF FACILITIES-BASED CARRIERS WITH COMPETITIVE PRICES; U.S. RESELLERS OF FOREIGN SERVICES DO NOT HAVE THE SAME PRACTICAL OPPORTUNITIES IN NON-U.S. MARKETS

FOREIGN CARRIERS WITH MONOPOLIES IN THEIR HOME MARKETS WILL TAKE ADVANTAGE OF RESALE LOOPHOLE IN THE EMA RULES TO ENTER THE U.S. MARKET VIA RESALE WITHOUT MAKING ANY MARKET-OPENING CHANGES IN THEIR HOME MARKETS

- TLD fulfilled its prediction that this would occur when it filed it application for authority to operate as a reseller on the U.S. mainland after the NPRM was issued

THE ESTABLISHMENT OF COST-BASED ACCOUNTING RATES IS NECESSARY TO PROTECT U.S. CUSTOMERS EVEN WHERE THE COMMISSION FINDS EFFECTIVE MARKET ACCESS EXISTS

NO ONE DISPUTES COMMISSION FINDINGS THAT ABOVE COST ACCOUNTING RATES ARE NECESSARY TO BRING FULL BENEFITS OF U.S. COMPETITION TO U.S CUSTOMERS.

- U.S. customers bear increasing settlements outpayments year after year
- Despite steps taken to date by the Commission and U.S. carriers, settlements costs on a unit basis remain constant for U.S. carriers and continue to represent the predominant cost of U.S. carrier services

NO COMMENTER ARGUED IN FAVOR OF ABOVE-COST ACCOUNTING RATES -- INSTEAD, THEY SUGGEST THAT THE COMMISSION SHOULD RELY ON LESS EFFECTIVE MEANS TO REACH THE DESIRED GOAL

- No foreign carrier disputed that its accounting rate was above cost
- No foreign carrier filing comments agreed to resolve the issue by setting cost-based accounting rates with U.S. carriers

THE NPRM'S PROPOSAL TO CONSIDER "THE PRESENCE OF COST-BASED ACCOUNTING RATES AS PART OF...THE TOTAL PUBLIC INTEREST ANALYSIS" DOES NOT GO FAR ENOUGH TO PROTECT U.S. CUSTOMERS. THE COMMISSION SHOULD EXERT ITS STATUTORY AUTHORITY TO REQUIRE COST-BASED ACCOUNTING RATES AS A PRE-CONDITION OF ENTRY

- Commission has found that its jurisdiction over accounting rates extends to the level and structure of those rates not only to prevent discrimination but to reduce subsidies paid by U.S. customers
- Commission also has ample jurisdiction to evaluate transactions between a regulated company and its unregulated affiliate to protect against anti-competitive conduct, including cross-subsidization.

ANTICOMPETITIVE HARM EXISTS WHEN THE RECIPIENT OF ABOVE-COST ACCOUNTING RATES PARTICIPATES IN THE U.S. INTERNATIONAL SERVICES MARKET -- EVEN WHEN ALL U.S. CARRIERS PAY THE SAME SETTLEMENT RATE

- For example, AT&T's prices must recoup the settlement costs it pays to Telefonica; TLD's payments to Telefonica, however, are intracorporate transfer payments that can be recouped by TLD through intracorporate transactions

- TLD has endorsed this principle in its opposition to AT&T's St. Thomas/St. Croix's landing license application (SCL-94-006). While wrong on the facts (AT&T Submarine Systems has no monopoly rights), TLD states:

  > "Even if the Commission required AT&T-SSI to charge the same per unit price to affiliated AT&T carriers as it charges non-affiliated carriers, AT&T could still obtain an advantage by charging a monopoly price to all customers. While AT&T's affiliated regulated carrier would still have to pay this monopoly price, they would merely be making an interaffiliate transfer payment to AT&T-SSI."

THE *EXISTENCE OF EFFECTIVE COMPETITION* IN FOREIGN MARKETS COULD ULTIMATELY LEAD TO COST-BASED ACCOUNTING RATES -- THE *EXISTENCE OF CONDITIONS FOR THE DEVELOPMENT OF COMPETITION* WILL NOT IN THE TIME-FRAME NECESSARY FOR U.S. CARRIERS TO COMPETE ON A FAIR BASIS WITH FOREIGN CARRIERS

- Window of opportunity between existence of effective competition and finding that conditions exist for effective competition to develop in the future is a handicap that U.S. carriers and customers should not be required to bear
- Accounting rates in the U.K. and Canada are lower than most, but still significantly above-cost -- BT's refusal to commit to cost-based levels by 1997 reveals that path to cost-based accounting rates does not follow from emerging market openness
- Evidence in Chile suggests that sequencing is an issue: unless cost-based accounting rates are set before fierce competition in-country, foreign carriers are incented to find ways to maintain existing outbound/inbound ratios to preserve settlements inpayments to fuel price competition within foreign market

THE COMMISSION HAS TAKEN A MULTI-FACETED APPROACH TO REDUCE ACCOUNTING RATE LEVELS. EXERCISING ITS JURISDICTION OVER FOREIGN CARRIERS TO REMOVE ANTICOMPETITIVE OPPORTUNITIES AND TO PROTECT U.S. CUSTOMERS BY REQUIRING COST-BASED ACCOUNTING RATES AS A CONDITION OF ENTRY IS A REASONABLE AND NECESSARY ADDITIONAL TOOL THE COMMISSION SHOULD USE

(0/I × SR) × share

industry
marginal cost = A/K − value of shift of returns

= S/R.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 94-324

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast Interests	)	MM Docket No. 94-150
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission's Cross-Interest Policy	)	MM Docket No. 87-154

NOTICE OF PROPOSED RULE MAKING

Adopted: December 15, 1994 Released: January 12, 1995

Comment Date: April 17, 1995
Reply Comment Date: May 17, 1995

By the Commission:

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Paragraph

I. Introduction

1. With this Notice, we commence a thorough review of our broadcast media attribution rules,[1] the rules by which we "define what constitutes a 'cognizable interest' for the purpose of applying the multiple ownership rules to specific situations."[2] The multiple ownership rules limit the number of broadcast stations that a single person or entity, directly or indirectly, is permitted to own, operate, or control, so as to foster programming diversity by encouraging diversity of ownership, and to assure competition in the provision of broadcast services.[3]

2. A number of changes in the broadcasting industry and in other Commission Rules

[1] The broadcast attribution rules are set out in Notes to 47 C.F.R. § 73.3555. Our current attribution rules were adopted in Report and Order in MM Docket No. 83-46, 97 FCC 2d 997 (1984) ("Attribution Order"), recon. granted in part, Memorandum Opinion and Order in MM Docket No. 83-46, 58 RR 2d 604 (1985) ("Attribution Reconsideration"), further recon. granted in part, Memorandum Opinion and Order in MM Docket No. 83-46, 1 FCC Rcd 802 (1986) ("Attribution Further Reconsideration").

[2] Attribution Order, 97 FCC 2d at 999. Generally, we do not consider interests that fall below the attribution benchmarks or those that are exempted or excluded under the attribution rules as of concern in determining whether a licensee or applicant is in compliance with our multiple ownership rules.

[3] An analysis of the Commission's diversity and competition policies, discussed in connection with our review of the television multiple ownership rules, is contained in the Further Notice of Proposed Rule Making in MM Docket No. 91-221 ("Review of the Commission's Regulations Governing Television Broadcasting"), FCC 94-322 (adopted Dec 15, 1994).

since our last revision of the attribution rules prompt us to initiate this review.[4] First, the multiple ownership rules themselves, to which the attribution rules are related, are undergoing change. We have relaxed our radio multiple ownership rules,[5] we have narrowly relaxed our radio-television cross-ownership rule,[6] and, today, in a separate proceeding, we seek comments as to whether we should relax national and local multiple ownership limits for television stations, including the one-to-a-market rule.[7] In an additional separate proceeding adopted today, we also are considering a variety of measures, including relaxing our attribution rules, to aid the entry of minorities and, if deemed necessary, women into broadcasting. We wish to ensure that the attribution rules remain effective in light of the previous and proposed relaxation of the multiple ownership rules.

3. Other concerns merit a reevaluation of our attribution rules. For example, concerns have been raised that certain nonattributable investments, while completely permissible, may permit a degree of influence that warrants their attribution for multiple

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[4] We note that the Commission is statutorily prohibited from expending any of its appropriated funds "to repeal, to retroactively apply changes in, or to begin or continue a reexamination of the rules and the policies established to administer such rules of the Federal Communications Commission as set forth at section 73.3555(d) of title 47 of the Code of Federal Regulations other than to amend policies with respect to waivers of the portion of section 73.3555(d) that concerns cross-ownership of a daily newspaper and an AM or FM radio broadcast station." Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, 108 Stat. 1724, 1738 (1994). Section 73.3555(d) prohibits ownership of a daily newspaper and a broadcast station in the same market. We invite comment on whether the proposed changes to the attribution rules fall within the scope of the prohibition and should be limited accordingly.

[5] Revision of Radio Rules and Policies, 7 FCC Rcd 2755 (1992), recon. granted in part, 7 FCC Rcd 6387 (1992), further recon., FCC 94-267 (released Nov. 8, 1994), 59 Fed. Reg. 62,609 (Dec. 6, 1994), 9 FCC Rcd 7183 (1994).

[6] See 47 C.F.R. § 73.3555, Note 7.

[7] See Further Notice of Proposed Rule Making in MM Docket No. 91-221, FCC 94-322 (adopted Dec. 15, 1994). We note that in two pending proceedings we sought comment on certain proposed amendments to the attribution rules and our cross-interest policy. Notice of Proposed Rule Making and Notice of Inquiry in MM Docket No. 92-51, 7 FCC Rcd 2654 (1992); Further Notice of Inquiry/Notice of Proposed Rule Making in MM Docket No. 87-154, 4 FCC Rcd 2035 (1989). We issue this Notice to update the existing record in these proceedings, expand the areas of inquiry, and consolidate pending broadcasting attribution issues into one omnibus proceeding.

ownership purposes.[8] Moreover, we are concerned that otherwise permissible cooperative arrangements between broadcasters, which seem to be occurring more frequently in recent years, are being used in combination by those broadcasters to obtain, indirectly, controlling interests in multiple stations that they would be prohibited from holding directly under the multiple ownership rules. Further, we have received applications in which the applicant utilizes a new business form, such as a Limited Liability Company ("LLC"), and we intend to consider how to treat such new business forms for attribution purposes. Finally, we have recently adopted or revised attribution rules for other services that we regulate, and we seek to review the broadcast attribution rules in light of those other attribution rules to ensure that any differences are justified by other factors such as differences between the media or our policies regulating them.

4. In considering revisions to the mass media attribution rules, we seek to identify and include those positional and ownership interests that convey a degree of influence or control to their holder sufficient to warrant limitation under the multiple ownership rules. As we have noted, the attribution rules "represent the Commission's judgment regarding what ownership interest in or relation to a licensee will confer on its holder that degree of influence or control over the licensee and its facilities as should subject it to limitation under the multiple ownership rules."[9] For purposes of the multiple ownership rules, the concept of "control" "is not limited to majority stock ownership, but includes actual working control in whatever manner exercised."[10] We have defined "de jure" control as ownership of more than 50 percent of a corporation's outstanding voting stock.[11] We have determined who has "de facto" control of a licensee on a case-by-case basis, looking generally for this purpose to determine who has ultimate control over a licensee's programming, financial and personnel policies.[12] Where we have referred to "influence," we have viewed it as an interest that is less than controlling, but through which the holder is likely to induce a licensee or permittee

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[8] For example, concerns have been raised recently that networks, while securing interests in stations that do not trigger attribution of an ownership interest, may nevertheless have used (nonvoting or otherwise nonattributable) equity investments to influence station affiliation decisions. See Christopher Stern, "Small Investments Yield Big Benefits," Broadcasting & Cable, October 17, 1994, at 26.

[9] Attribution Order, 97 FCC 2d at 999.

[10] 47 C.F.R. § 73.3555, Note 1.

[11] See Attribution Order, 97 FCC 2d at 1018 n. 47; Metromedia, Inc., 98 FCC 2d 300, 306 (1984), recon. denied, 56 RR 2d 1198 (1985), appeal dismissed sub nom., California Association of the Physically Handicapped v. FCC, 778 F.2d 823 (D.C. Cir. 1985).

[12] See, e.g., Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981); Stereo Broadcasters, Inc., 55 FCC 2d 819, 821 (1975).

to take actions to protect the investment.[13] Our judgment as to what level of "influence" should be subject to restriction by the multiple ownership rules has, in turn, been based on our judgment regarding what interests in a licensee convey a realistic potential to affect its programming and other core operational decisions.[14]

5. While our focus is on the issues of influence or control, at the same time, we must tailor the attribution rules to permit arrangements in which a particular ownership or positional interest involves minimal risk of influence, in order to avoid unduly restricting the means by which investment capital may be made available to the broadcast industry.[15] We intend to ensure that any revisions we make to the attribution rules meet these stated goals. We also seek to ensure that any new rules adopted are clear to our broadcast regulatees, provide reasonable certainty and predictability to allow transactions to be planned, ensure ease of processing, and provide for the reporting of all the information we need in order to make our public interest finding with respect to broadcast applications.

II. Background and Current Rules

6. The attribution rules have evolved gradually since their inception,[16] in response to changes in the broadcast industry, including the growth of and changes in sources of capital investment. In adopting the first attribution rules in 1953, in conjunction with the "seven-station" multiple ownership rule, the Commission considered the issue of control of business organizations and sought to ensure that it would not miss any potentially influential interests.[17] Specifically, believing that the holder of a small interest could exert a considerable influence on the operation of a station, the Commission decided to attribute all voting shares in a closely-held company, and, for companies with more than 50 voting shareholders, all voting shares of one percent or more of the outstanding voting stock. In addition, noting the influence of officers and directors over a licensee's day-to-day activities and citing federal antitrust statutes dealing with interlocking directorships and officerships, the Commission held cognizable the interests of officers and directors of licensees, whether or not they held stock in the licensee.[19]

7. As new types of equity investments and financial instruments were introduced into the financial markets and the broadcast industry, the nature of the financial markets themselves continued to change. Large institutional investors began to hold larger portfolios and to contribute larger amounts of capital to the market. Taking note of the purposes and operation of investment companies, brokerage houses, and certain trusts, in particular, among these larger investors, the Commission observed that while these entities acquired voting stock in their own name, they often held it solely for the benefit of other entities. Therefore, the Commission responded by attributing corporate voting stock solely to the entities with the right to vote that stock.[20] Also, we observed that certain institutional entities were generally acquiring their stock for investment purposes, with no intent to influence or control the broadcast licensees in question. Thus, we defined them as "passive" investors. Accordingly, we gradually increased the attribution benchmarks for certain institutional "passive" investors (investment companies, insurance companies and bank trust departments).[21] Ownership is generally attributed to a stockholder whose voting shareholdings equal or exceed the voting stock attribution benchmark. This may be of concern for banks and other passive investors, which hold stock for investment purposes only in many different media outlets.

8. The attribution rules were last revised over a two-year period between 1984 and 1986. At that time, the Commission raised the attribution benchmark for voting stock from 1 percent to 5 percent, after exhaustive study and analysis, including a thorough survey of its ownership files to determine the size of typical stockholdings, and a review of other federal agency benchmarks.[22] That decision reflected changes in the broadcasting industry and the Commission's perception of the changing roles of smaller voting shareholders. The Commission concluded that 1 percent shareholders were extremely unlikely to be able to exert any influence over a corporate licensee and that their influence was de minimis in comparison with that of firm managers and of more sophisticated large shareholders with greater holdings. The Commission also raised the attribution level for voting stock held by certain institutional investors (bank trust departments, investment companies, and insurance

[13] See, e.g., Amendment of Multiple Ownership Rules, 18 FCC 288, 292-93 (1953) ("1953 Multiple Ownership Rules").

[14] Attribution Order, 97 FCC 2d at 1005.

[15] See, e.g., Attribution Order, 97 FCC 2d at 1020.

[16] As noted above, the attribution rules govern application of the multiple ownership rules, which are intended to promote diversity and competition.

[17] 1953 Multiple Ownership Rules, 18 FCC at 292-93.

[18] 1953 Multiple Ownership Rules, 18 FCC at 293-94.

[19] 1953 Multiple Ownership Rules, 18 FCC at 293.

[20] Report and Order in Docket No. 15627, 13 FCC 2d 357, 363 (1968) ("1968 Attribution Rules").

[21] Id. at 369 (mutual funds from 1% to 3%); Report and Order in Docket No. 18751, 34 FCC 2d 889, 891-92 (1972) ("1972 Attribution Rules") (bank trustees from 1% to 5%); Report and Order in Docket No. 20520, 59 FCC 2d 970 (1976), recon. granted in part, 63 FCC 2d 336 (1977), aff'd sub nom. National Citizens Committee for Broadcasting v. FCC, 559 F.2d 187 (D.C. Cir. 1977) ("1976 Attribution Rules") (investment companies from 3% to 5%, and insurance companies and banks from 1% to 5%).

[22] Attribution Order, 97 FCC 2d at 1003-1012.

companies) from 5 percent to 10 percent on the grounds that their passive investor status warranted adopting a higher benchmark.[23]

III. Recent Proceedings

9. In recent years, the Commission has instituted other proceedings that have begun to reexamine the assumptions upon which the attribution rules and cross-interest policy[24] rest and to determine whether they continue to serve the public interest. These reexaminations were prompted by significant changes in the video marketplace and the broadcasting business, including greatly increased competition and the past economic downturn in the industry. In issuing this Notice to review our current attribution rules, we have elected to consolidate and comprehensively reexamine these other pending proceedings that directly or indirectly implicate the attribution rules. Specifically, in 1992, in our Notice of Proposed Rule Making and Notice of Inquiry in MM Docket No. 92-51, 7 FCC Rcd 2654 (1992) ("Capital Formation Notice"), we sought comments on whether we should relax several of our attribution rules in a number of specific contexts in order to stimulate investment in the broadcast industry and to benefit new entrants, including minorities and women, who have historically experienced significant difficulties in securing adequate start-up funding.[25] We inquired as to whether we should relax our attribution benchmarks for active and passive stockholders, and modify our insulation criteria as to widely-held limited partnerships, including business development companies organized as such. We will incorporate the record from MM Docket No. 92-51 into the record of this proceeding to the extent that it is relevant to our consideration of the foregoing issues.[26]

10. We will also consider in this proceeding the comments received in response to our Further Notice of Inquiry/Notice of Proposed Rule Making in MM Docket No. 87-154, 4

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[23] Attribution Order, 97 FCC 2d at 1012-17.

[24] The Commission's cross-interest policy prevents individuals from having "meaningful cross-interests in two broadcast stations, or a daily newspaper and a broadcast station, or a television station and a cable television system, when both outlets serve "substantially the same area." Notice of Inquiry in MM Docket No. 87-154, 2 FCC Rcd 3699 (1987). At present, the following are viewed as "meaningful" relationships subject to the policy, which is enforced on an ad hoc, case-by-case basis: key employees, joint ventures, and nonattributable equity interests. Further Notice of Inquiry/Notice of Proposed Rule Making in MM Docket No. 87-154, 4 FCC Rcd 2035 (1989).

[25] Capital Formation Notice, 7 FCC Rcd 2654 (1992).

[26] In the Capital Formation Notice, 7 FCC Rcd at 2657-59, we also asked whether we could, under the Communications Act, and should, for policy reasons, permit the holding of security and reversionary interests in licenses. We will resolve that issue in a separate proceeding.

FCC Rcd 2035 (1989) ("Cross-Interest Notice"), in which we asked for comments as to whether we should maintain our cross-interest policy in three areas -- key employees, non-attributable equity interests, and joint ventures. In the Cross-Interest Notice, we invited comment as to whether we should amend the attribution rules to incorporate the key employee portion of the cross-interest policy. We will incorporate the record from MM Docket No. 87-154 into the record of this proceeding.

11. We note that this proceeding is complementary with, and will affect our actions in, two rulemaking proceedings in which we have today adopted Notices: the pending rule making regarding the multiple ownership rules for television stations;[27] and a companion proceeding inviting comment on whether we should adopt a number of rule changes and initiatives to provide minorities and women with greater opportunities to enter the mass media industry.[28] We specifically seek comment in the latter proceeding as to whether we should relax our mass media attribution rules to help minority- and women-owned businesses raise capital. Since the content of the attribution rules is critical to issues raised in both proceedings, we will review the comments received in those proceedings in conjunction with the comments received in the instant proceeding to assure a coordinated approach to the three proceedings.

IV. Underlying Principles

12. As we undertake our analysis of the nature and size of interests in broadcast licensees that should be held cognizable for ownership attribution purposes, we are guided by basic economic concepts as to the essential nature of firms, their control, and their conduct. We invite comment on our analysis and encourage parties to support their views with relevant empirical analysis and business and economic theories. We also invite commenters to propose alternative analytical frameworks for establishing the specific interests that should be deemed cognizable under our various multiple ownership rules. Our analysis will focus essentially upon the effect that financial claims on, and associated voting or contractual rights in, broadcasting companies have on their conduct.[29] The economic conduct of concern to us

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[27] See Notice of Proposed Rule Making in MM Docket No. 91-221, 7 FCC Rcd 4111 (1992). We have adopted a Further Notice of Proposed Rule Making in that proceeding today. Further Notice of Proposed Rule Making in MM Docket No. 91-221, FCC 94-322 (adopted Dec. 15, 1994).

[28] Notice of Proposed Rule Making in MM Docket Nos. 94-149 and 91-140, FCC 94-323 (adopted Dec. 15, 1994).

[29] The various financial claims on a broadcaster may range from the interests of various kinds of equity holders, to different debtholders, and to contractual relationships, including those with suppliers and consumers of various materials and services, such as, for example professional managers. Each of these financial claims establishes a relationship between the claimant and the licensee that may give rise to that claimant's ability to influence, directly or

relates to a broadcasting company's programming choices, including affiliation choices, and competitive practices, including advertising pricing. To address these issues with a desirable degree of confidence, we will need as much information as is available to establish the connections and thresholds of concern between financial claims on a firm and its conduct.

13. Accordingly, with respect to each specific ownership or relational interest discussed herein, we seek comment on whether the level or degree of ownership interest in, or relationship to a licensee would be likely to impart the ability to influence or control the operations of the licensee, including core functions such as programming, such that the multiple ownership rules should be implicated. We intend to base our judgment with respect to each specific attribution limit or criterion considered in this Notice on as much empirical data as can be obtained, as well as economic and business theories on levels of influence in business organizations, as discussed above, and we specifically invite comments that contain such data and are grounded in rigorous economic theories and analyses. In setting a specific attribution limit or determining whether a particular interest should be cognizable or not, we ask commenters to address the degree to which we should attempt to accommodate the competing concerns that have motivated us in the past, such as not inhibiting legitimate business opportunities and encouraging the flow of capital investment into the broadcast industry. An important consideration is the extent to which we can and should accommodate these interests directly, by, for example, creating specific provisions in the ownership rules themselves. In every case if the new rule or exemption proposed represents a departure from our current rules and standards, commenters should demonstrate the justifications for such a departure. Additionally, in light of our desire to promote ownership opportunities for minorities and women in the broadcasting industry, we invite comment on whether there are other attribution rules, besides those discussed in MM Docket Nos. 94-149 and 91-140, that should be adjusted to promote access to capital for minorities and women.[30]

14. We seek empirical data and analysis that would indicate the ownership level that would likely impart to its holder some ability to influence the operation of a broadcast station in a manner that is intended to be limited by our multiple ownership rules. Also, we seek data and/or analysis, based on sound economic principles, to demonstrate that changing the attribution rules would have a significant effect on capital investment and new entry. We also seek detailed economic data regarding how the capital needs and outlays of broadcasters have changed since the current attribution rules were set, as well as since the earlier set of comments were submitted in response to the Capital Formation Notice, and any impediments to adequate financing imposed by the current rules.

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indirectly, some aspect of a licensee's operation.

[30] In our companion Notice in MM Docket Nos. 94-149 and 91-140, we request current data regarding female ownership of mass media facilities to determine whether women are underrepresented as mass media owners.

15. We are concerned that any action that we take in this proceeding not inhibit capital investment nor disrupt existing financial arrangements, and we seek comment as to both of these areas with respect to our proposals herein. We also seek comment on whether, and, if so, to what extent, we should grandfather existing situations if any modifications we make to the attribution rules, for example, restricting the availability of the single majority shareholder exemption or attributing nonvoting stock, would result in a new attribution of ownership to an entity for a previously held interest, and that new attribution would result in a violation of the multiple ownership rules. Alternatively, should we permit a transition period, during which licensees could come into compliance with the multiple ownership rules, as affected by any changes we make in the attribution rules?

16. We recognize now, as we did in the Attribution Order,[31] that any specific benchmark or limit that we adopt will not include every influential interest that might be limited by the multiple ownership rules. A particular holding or interest not considered cognizable under our rules may, in the context of the structure of a particular business, including the relative distribution of ownership interests in that company, permit a degree of influence or control that should be regulated under the multiple ownership rules. On the other hand, a rule of general applicability drawn so strictly as to include every possible influential interest would ensnare innumerable interests that have no ability to impart influence or control over a licensee's core decision-making processes to their holders. Weighing these considerations, we preliminarily conclude that our goals of predictability and certainty can best be achieved if we continue to use benchmarks and specific attribution limits rather than proceeding on an ad hoc basis. Of course, we retain the discretion to treat specific factual situations on a case-by-case basis.[32] Commenters may, of course, address these basic propositions.

V. Stockholding Benchmarks

17. In devising our attribution rules, we proceed on the basis of certain assumptions. As noted above, our attribution rules focus on the issues of influence on and control of a firm. While the potential for influence may be inherent in a broad range of interests, for economic reasons, equity holders govern or control the management of the firm. Consequently, as we examine control of and influence in a firm, we should first concentrate on equity holders and address whether or not particular equity holdings have the potential to control or influence the firm and its activities. In this Notice, we invite comment on whether to revise our treatment of corporate shareholders for attribution purposes. First, we invite additional comment on whether to raise the benchmarks for voting shares from 5 percent to 10 percent and from 10 percent to 20 percent for certain passive investors. Second, we

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[31] 97 FCC 2d at 1006.

[32] See, infra, Section VIII (seeking comments on whether case-by-case oversight is necessary for certain cross interests and multiple business interrelationships).

invite comment on whether we should restrict the availability of the single majority shareholder exemption from attribution. Finally, we seek comment on whether we should attribute nonvoting shares, at least in certain circumstances.

A. Voting Stock

18. We now attribute ownership to holders of 5 percent or more of the voting shares of corporations.[33] We do not attribute the shares of nonvoting shareholders, regardless of the percentage of the equity of the corporation contributed by those shareholders or the percentage of the nonvoting shares that they hold.[34]

19. We adopted the current benchmarks in 1984, based on our finding that the previous benchmarks had become unduly restrictive as a result of changes in the broadcast industry and in the investment community.[35] We further observed that a relaxation of the attribution benchmark would serve the public interest by increasing investment in the industry and by promoting the entry of new participants by increasing the availability of start-up capital.[36] In approaching the attribution benchmark issue, we looked to other federal agencies for analogous ownership thresholds and examined other data.[37]

20. We selected the 5 percent benchmark because, according to our examination, a 5 percent shareholder in a widely-held corporation would typically be one of the two or three largest corporate shareholders and thus could potentially influence a licensee's management and operations. Accordingly, we determined that shareholders meeting the 5 percent benchmark would likely have the potential for influencing or controlling a licensee, while those with smaller stockholdings would likely not have such potential. We found other regulatory support for the 5 percent threshold in the Securities and Exchange Commission's ("SEC") rules that require the reporting of ownership interests of 5 percent or greater.[38] The SEC's reporting threshold was intended to protect shareholders' ability to make informed investment decisions by providing them with timely information regarding potential tender offers and other potential changes in corporate ownership or control. We concluded that the objectives of this requirement most closely paralleled in purpose our own objectives in identifying interests with the potential for significant influence or control.[39]

21. In the Capital Formation Notice, we proposed to increase the general attribution benchmark for voting stock from 5 percent to 10 percent in order to stimulate capital investment. With respect to this proposal, we asked commenters how we might preserve investment flexibility while adequately accounting for all influential interests that merit scrutiny under our rules. Based on the record thus far, we do not have information sufficient to justify raising the benchmark to 10 percent. Commenters addressing this issue unanimously supported raising the benchmark,[40] but they did not provide us with critical information we would need before we could conclude that raising the benchmark to 10 percent would not exclude many substantial and influential interests from attribution, or that such exclusion is warranted by competing needs of greater weight. Specifically, commenters asserted that the changes in the economic and competitive environment of the media marketplace since the mid-1980s necessitated revisions in the attribution rules. In addition, they argued that such an increase in the attribution benchmark would facilitate additional investment in the broadcast industry while continuing to adequately identify ownership interests that afford influence or control over a licensee's management or operations. They did not, however, provide us with enough information on the changes in the economic climate and competitive marketplace that would justify raising the benchmark or explain and verify the link between raising the attribution benchmark and precipitating additional capital investment. Without such information, we are not comfortable raising the benchmark.

22. In particular, before we could consider raising the attribution benchmark to 10 percent, we would need answers to the general questions raised in paragraphs 12 through 16

[33] 47 C.F.R. § 73.3555, Note 2(a). As discussed infra ¶ 47, the benchmark for certain passive investors is 10 percent.

[34] 47 C.F.R. § 73.3555, Note 2(f).

[35] Attribution Order, 97 FCC 2d at 1002. For widely-held corporations, these changes were: (1) the diminished ability of a 1 percent stockholder to exercise any influence over a widely-held corporation, due to the general increase in the number of small shareholders, and (2) the decreasing exercise of shareholder rights by their owners due to both the growing sophistication of company management and the rising participation in the stock market by people without management sophistication. Id. at 1004-07. In adopting the current benchmarks, we abandoned the previous distinction between widely-held and closely-held corporations, finding, with respect to closely-held corporations, that a 5% benchmark was also appropriate and would eliminate attribution for most noncontrolling and noninfluential stock interests. Id. at 1007-08.

[36] Id. at 1002, 1007-08, 1012.

[37] In particular, we surveyed the Commission's ownership files to determine the typical size and distribution of stockholding among licensees. Id. at 1002-07, 1009-10.

[38] Securities and Exchange Act § 13(d), 15 U.S.C. § 78m(d).

[39] Attribution Order, 97 FCC 2d at 1006-07, 1009.

[40] See Comments of A.H. Belo Corporation et al. ("Belo"), Great American Television and Radio Company, Inc. ("Great American"), National Association of Broadcasters ("NAB"), National Association of Investment Companies ("NAIC"), Canadian Imperial Bank of Commerce ("CIBC"), and the Investment Company Institute ("ICE"). Belo asserted that other federal agencies use ownership benchmarks well above 10 percent to define controlling interests of entities under their jurisdiction, although Belo did not sufficiently define the relevance of these benchmarks to the goals of our attribution and multiple ownership rules.

supra, as well as the following specific issues. While commenters argued that a less than ten percent stockholding is not, in itself, sufficient to presume that the holder could exert control or influence over the corporation, they do not explain the basis for that claim or provide any specific information that would allow us to devise a methodology to assume that such a stockholder would remain inactive in the affairs of the company in most or all cases. Moreover, we ask commenters whether such factors as the size, composition of management, and minority shareholder rights of individual corporations might not be increasingly relevant where larger nonattributable stockholdings are permitted. We therefore ask commenters to provide detailed illustrations of the role of minority shareholders in the management of a corporation. In addition, we seek more detailed information about the impact of minority shareholder rights on corporate management generally, particularly in those instances where individual minority shareholders might act in concert with others to affect the decision making of the corporate licensee or permittee.

23. In the Attribution Order, we concluded that the adoption of a benchmark higher than 5 percent may result in many substantial and influential interests being overlooked and that the need to adopt a higher threshold was unclear since every demonstrable benefit to be derived from relaxing the attribution rules would be achievable in large measure from adopting a 5 percent benchmark.[41] We ask commenters to provide evidence that the specific conclusions we reached in the Attribution Order are no longer valid. In particular, we noted in the Capital Formation Notice that our prior determination not to adopt a 10 percent benchmark had been made in economic and competitive circumstances materially different from those prevailing when the Capital Formation Notice was adopted.[42] Do current market conditions cast doubt on the foregoing conclusions made in the Attribution Order, and if so, what evidence is there that, based on market conditions, raising the attribution benchmark to 10 percent will not incur the risks of ignoring substantial controlling or influential interests that concerned us in 1984? What interests or reasons might justify nonattribution of such substantial interests?

24. With respect to the issue of facilitating increased capital investment, we seek answers to the following questions. Is there support for the assumption that an increased attribution benchmark will result in greater capital investment? If so, how would any increased availability of or reduced cost of capital resulting from an increased attribution benchmark be likely to be allocated between smaller, less established broadcasters and larger, more established ones? Should we be concerned that proportionately increasing the capital available to larger entities or reducing its cost to them might actually strengthen those licensees that already dominate the broadcast industry, thereby threatening competition and diversity? Analyses of these effects at several different hypothetical attribution benchmarks are requested.

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[41] Attribution Order, 97 FCC 2d at 1006-07.

[42] Capital Formation Notice, 7 FCC Rcd at 2655.

25. Commission Attribution Rules in Other Services and Attribution Rules in Other Agencies. As we consider revising our broadcast attribution rules, we will take note of the attribution rules we apply in other services and the attribution rules applied by other federal agencies, to the extent that they are relevant to our purposes and goals.

26. Commission Attribution Rules in Other Services. We seek comment on the relevance of attribution rules applied in other FCC services. Many of our attribution rules, including those in most cable and in Personal Communications Services ("PCS") multiple-ownership contexts, incorporate a five percent ownership benchmark.[43] As noted above, we set a five percent voting stock attribution benchmark for broadcasters based on our finding that it identifies those ownership thresholds that enable an entity to influence or control programming or other core decisions. The other services that use a five percent benchmark may apply it differently, but they have generally relied upon this finding in so doing.[44] A critical matter we seek comment on is whether and how a change in our broadcast attribution benchmark would affect the many services that rely on it.

27. In the contexts of cable operator/broadcast network cross-ownership,[45] cable national subscriber (horizontal) limits,[46] and cable channel occupancy (vertical) limits,[47] the attribution standards are identical to those used in broadcasting.[48] Indeed, in drafting these cable attribution rules, we expressly adopted the broadcast model based on our view that the purpose of these cable attribution rules is similar to the purpose of the broadcast attribution rules: to identify those ownership thresholds that enable an entity to influence or control management or programming decisions (for broadcasters) or the programming marketplace

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[43] Unless stated otherwise, the attribution rules discussed in this section share certain characteristics: they attribute all general partnership interests, any entity that exercises actual working control, and officers and directors of the licensee. One exception to the last classification is video dialtone, in which officers and directors hold attributable interests only if they are also shareholders.

[44] See, e.g., Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking in CC Docket 87-266, FCC 94-269 (released Nov. 7, 1994) ("Video Dialtone Reconsideration"), ¶ 68.

[45] 47 C.F.R. § 76.501, Note 2.

[46] 47 C.F.R. § 76.503(f).

[47] 47 C.F.R. § 76.504(h).

[48] 47 C.F.R. § 76.501, Note 2. This has also long been the standard for cable/broadcast cross-ownership.

(for the two cable concentration attribution rules).[49] Further, Congress has suggested that the diversity rationale is relevant to cable.[50] Consequently, we deemed it appropriate to apply the broadcast attribution standards to the foregoing cable contexts.

28. However, we apply different, usually more restrictive, attribution rules with respect to other cable ownership rules. For instance, in analyzing ratemaking valuation methods for a cable operator's affiliate's transactions ("cable rate valuations"), the Commission considers five percent or more of a corporation's total equity (i.e., the combination of both voting and nonvoting stock) as an attributable interest.[51] We do not apply a single majority shareholder exception. Further, we attribute all limited partnership interests of 5 percent or more, unlike the broadcast attribution rules, which do not currently apply an equity benchmark to limited partnership interests. As discussed infra, the broadcast attribution rules relieve limited partnership interests from attribution in situations where those interests satisfy insulation criteria[52] designed to ensure that the limited partner cannot influence or control the limited partnership.

29. These more restrictive attribution rules reflect the statutory goal intended to be served by these ratemaking rules: to ensure that consumers pay reasonable rates for regulated cable service.[53] In this case, then, the issue is not merely influence or control, but, rather, whether the operator-affiliate relationship is sufficient to create an incentive for cable

[49] See Second Report and Order in MM Docket No. 92-264, 8 FCC Rcd 8565, 8581, 8591-92 (1993) ("Horizontal and Vertical Limits Second Report and Order"). Moreover, in adopting the cable attribution rules we cited the legislative history of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), which suggested that the Commission adopt the broadcast criteria for the cable horizontal and vertical integration attribution rules. We also cited Section 11(f)(2) of the 1992 Cable Act, 47 U.S.C. § 533(f)(2), which directed the Commission, in part, to consider the significant benefits of industry concentration, including economies of scale and increased capital investment in more and better original cable programming. Thus, in keeping with statutory intent, we balanced the costs of industry consolidation with its significant benefits. As a result, these particular attribution rules set a somewhat less restrictive standard than do some of our other recently enacted cable regulations.

[50] Horizontal and Vertical Limits Second Report and Order, 8 FCC Rcd at 8583-84 (citing Sen. Rep. No. 102-92, 102d Cong., 2nd Sess. at 80, reprinted in 1992 U.S.C.C.A.N. 1133, 1213).

[51] See Report and Order and Further Notice of Proposed Rulemaking in MM Dockets No. 93-215 and CS 94-28, 9 FCC Rcd 4527, 4667-68 (1994) ("Cable Rate Valuation").

[52] The insulation criteria for limited partnerships will be discussed infra.

[53] 47 U.S.C. §§ 543(b) & (c).

operators to impose the costs of nonregulated activities on regulated cable subscribers through improper cross-subsidization.[54] In adopting them, we determined that wider-ranging attribution rules were necessary for us to meet our goals. We performed a similar analysis when we adopted identical standards for cable basic service tier rates and equipment.[55]

30. We apply the same, more restrictive, attribution criteria when examining ownership in the contexts of cable cross ownership with video programmers, Multichannel Multipoint Distribution Service ("MMDS"), and Satellite Master Antenna Television Service ("SMATV"). In each case, we have sought to adopt rules that would promote diversity and competition in general. Regarding the cable/programmer proscription,[56] we found that while the broadcast standards addressed some of our concerns, the proscription had a specific additional goal: to foster the development of competition to traditional cable systems.[57] Keeping that goal in mind, we found that a relatively inclusive rule was necessary to curb the incentives of cable operators to influence the behavior of their affiliates to the detriment of competitors.[58]

31. In the context of cable cross-ownership with MMDS and SMATV, we sought to prevent cable operators from "warehousing potential competition,"[59] to encourage alternative providers of multichannel video service, and to promote the development of local competition

[54] Cable Rate Valuation, 9 FCC Rcd at 4659, 4668. "Cross-subsidization" describes the process by which a cable operator purchases items from its unregulated affiliates for substantial sums, then passes on the artificial "cost" to consumers; or by which the cable operator charges an extremely low price to its affiliates when the undercharges can be offset by increased charges to consumers. Id. at 4664.

[55] More stringent attribution criteria include: stock interests of five percent of greater both voting and nonvoting; limited partnerships of five percent or more, regardless of insulation; and the absence of a single majority shareholder exception. Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, 8 FCC Rcd 5631, 5788 n. 601 (1993) ("Rate Order").

[56] 47 C.F.R. §§ 76.1000-1003.

[57] First Report and Order in MM Docket 92-265, 8 FCC Rcd 3359, 3360 (1993) ("Competition and Diversity in Video Programming Distribution and Carriage"), recon. granted in part on other grounds, FCC 94-287, released December 9, 1994.

[58] Id. at 3370.

[59] Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-264, 8 FCC Rcd 6828, 6841 (1993) ("Cable Horizontal and Vertical Limits First Report and Order") (citing S. Rep. No. 92, 102d Cong., 1st Sess. 46 (1992), reprinted in 1992 U.S.C.C.A.N. 1133).

to established cable operators. Again, we concluded that attribution rules more stringent than the broadcast rules were necessary to achieve these goals.[60]

32. We also adopted attribution rules for video dialtone, another service designed to provide multichannel video programming, that were more restrictive than the broadcast rules. The video dialtone rules hold attributable ownership interests comprising five percent or more of a corporation's outstanding stock, whether voting or nonvoting. Further, there is no single majority shareholder exception.[61] Like the broadcast multiple ownership rules, our video dialtone rules are intended to foster competition and diversity. However, the video dialtone ownership rules are also designed to reduce the likelihood of unfair discrimination by local exchange carriers. Relying in part on this distinction, we adopted different attribution rules for video dialtone than we apply in broadcasting. We noted that a nonvoting interest in a video dialtone provider would create incentives for discrimination, thereby implicating the foregoing concerns. We made the same observation with regard to the single majority shareholder exception: a 49 percent voting stockholder in that situation would similarly raise our discrimination concerns.[62]

33. We have established other attribution rules in services that are not intended for broadcasting: narrowband and broadband PCS, cellular, and the specialized mobile radio ("SMR") service.[63] In establishing these rules, our goals have been "competitive delivery a diverse array of services, rapid deployment, and wide-area coverage."[64] We have set the multiple-ownership attribution benchmark for broadband PCS at 5 percent of the equity outstanding stock, or outstanding voting stock of the corporation. The rules do not distinguish among limited partners based on whether or not they meet certain insulation criteria.[65] Further, the rules have no single majority shareholder exception.[66] Narrowband

[60] Id. at 6843, 6845.

[61] 47 C.F.R. § 63.54(e)(1).

[62] Video Dialtone Reconsideration at ¶ 69.

[63] See, e.g., 47 C.F.R. § 24.3. ("Broadcasting as defined in the Communications Act is prohibited" in the broadband PCS service.)

[64] Memorandum Opinion and Order in Gen. Docket No. 90-314, 9 FCC Rcd 4957, 4959 (1994) ("Broadband PCS Memorandum Opinion and Order").

[65] These criteria will be discussed more fully infra.

[66] 47 C.F.R. § 24.204(d)(2).

PCS service has the same 5 percent attribution benchmark as broadband PCS.[67]

34. However, for purposes of the rules restricting common ownership of PCS and cellular licenses in the same geographic service areas, we have adopted a benchmark of 20 percent of the cellular entity's total equity, voting stock, or nonvoting stock.[68] In so doing, we noted that adopting the more restrictive 5 percent benchmark would have failed to acknowledge the unique history of cellular licensing.[69] In this regard, we had earlier set a 20 percent attribution benchmark for cellular licensees, because voluntary settlements in the initial phase of the service were often resulting in significant, but noncontrolling, interests in cellular licenses being held by various entities. Therefore, we believed that subsequently enacting a stricter attribution rule for PCS (and other CMRS) ownership of a cellular entity would unfairly restrict the access of entities with noncontrolling cellular interests to the emerging mobile services market, thereby inhibiting the early development of PCS.[70]

35. We have taken a similar approach with SMR. Thus, for the purpose of the

[67] 47 C.F.R. § 24.101. See Memorandum Opinion and Order in Gen. Docket No. 90-314 and ET Docket No. 92-100, 9 FCC Rcd 1309, 1312-13 (1994); recon. granted in part, Second Memorandum Opinion and Order, 9 FCC Rcd 4519, 4521-22 (1994). It should be noted that petitions for reconsideration are pending with respect to certain aspects of the broadband and narrowband PCS attribution rules. See, e.g., Petition for Reconsideration and Clarification, filed by The Morgan Stanley Leveraged Equity Fund II, L.P., and Morgan Stanley Capital Partners III, L.P., on September 6, 1994, with respect to Further Order on Reconsideration in GEN Docket No. 90-314, 9 FCC Rcd 4441 (1994) (Broadband PCS order adopting multiplier); Petition for Reconsideration and Clarification, filed by The Morgan Stanley Leveraged Equity Fund II, L.P., Morgan Stanley Capital Partners III, L.P., Morgan Stanley Venture Capital Fund, L.P., and Morgan Stanley Venture Capital Fund II, L.P., on October 7, 1994, with respect to Second Memorandum Opinion and Order in GEN Docket No. 90-314 and ET Docket No. 92-100, 9 FCC Rcd 4519 (1994) (Narrowband PCS).

[68] 47 C.F.R. § 24.204(d)(2)(ii). However, we have carved out exceptions to this rule in order to foster ownership by certain designated entities that have traditionally had difficulty acquiring start-up capital. Specifically, pursuant to Section 309(j) of the Communications Act, 47 U.S.C. § 309(j)(4)(D), we have adopted a 40 percent benchmark for small businesses, rural telephone companies, and businesses owned by women or members of minority groups. Broadband PCS Memorandum Opinion and Order, 9 FCC Rcd at 5007-10.

[69] Second Report and Order in Gen. Docket No. 90-314, 8 FCC Rcd 7700, 7745-46 (1993) ("Broadband PCS Second Report and Order"), on recon, Broadband PCS Memorandum Opinion and Order, 9 FCC Rcd 4957, 5002 (1994), recon. granted in part and denied in part, Third Memorandum Opinion and Order, 59 Fed. Reg. 55372 (Nov. 7, 1994) ("Broadband PCS Third Memorandum Opinion and Order").

[70] Id.

SMR/cellular/broadband PCS spectrum aggregation limits, we have also adopted a benchmark of 20 percent of the equity, outstanding voting stock, or outstanding nonvoting stock of any of these entities.[71] By so doing, we promote a competitive environment for all players in the CMRS market.

36 We invite comment on the relevance of the foregoing attribution criteria, as well as others not discussed herein, to our consideration of the broadcast attribution rules. Does broadcasting have unique factors that make comparison with other Commission services inapposite, or, to the contrary, should we consider our action in other services as precedential? Is broadcasting sufficiently different from these other services in nature. function of the service or otherwise so as to justify any differences? Or, are the purposes of the broadcasting attribution and multiple ownership rules sufficiently distinct so as to justify any differences between those rules and those of the other Commission services?

37 Other Agency Benchmarks. In addition to taking note of the attribution rules used in other Commission services, we also seek comment as to regulatory benchmarks used by other federal agencies including those discussed below and other standards that commenters may bring to our attention

38 The general 10 percent attribution benchmark that was proposed in the Capital Formation Notice is employed in a number of other regulatory contexts. For example, Congress has enacted a 10 percent statutory attribution threshold to implement acreage limitations applicable to federally leased mineral rights.[72] As with the Commission's attribution standards this statutory threshold, administered by the Department of the Interior, provides a mechanism for enforcing ownership restrictions applicable to limited publicly owned resources

39 In a different context, the SEC uses a 10 percent equity benchmark in its insider trading restrictions. in Congress' judgment, holders of more than 10 percent of a company's stock, in addition to the company's officers and directors, are in a position to make unfair use of nonpublic information regarding the company.[73]

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[71] 47 C.F.R. § 20.6(d)(2). See Third Report and Order in Gen Docket No 93-252, 59 Fed Reg. 59945, 59948 (Nov. 21, 1994)

[72] One such acreage limitation, for instance, generally provides that no single entity can "take, hold, own, or control" more than 246,080 acres of land subject to federal oil or gas leases in any one state. See 30 U.S.C. § 184(d) The statute further establishes a 10 percent equity threshold for determining attribution of ownership in connection with these limitations. Id. at § 184(e).

[73] See Securities and Exchange Act § 16(b), 15 U.S.C. § 78p(b); Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 591 (1973).

40. The U.S. Department of Transportation ("DOT") employs a 10 percent benchmark in certain reporting and certification requirements applied to air carriers. An air carrier proposing a "substantial change in operations, ownership, or management" must submit certain data to DOT to allow the agency to determine whether the carrier will continue to meet its certification requirements.[74] A "substantial change in operations, ownership, or management" is, in turn, defined to include the "acquisition by a new shareholder or the accumulation by an existing shareholder of beneficial control of 10 percent or more of the outstanding voting stock in the corporation."[75] An applicant for a new certificate must also submit information regarding holders of 10 percent or more of its voting stock, including whether any such holders are officers, directors, or owners of 10 percent or more of the stock of another air carrier.[76]

41. DOT increased this reporting benchmark from 5 percent to 10 percent in a 1992 rulemaking proceeding, stating that it is "principally concerned about the effects on a carrier's fitness and U.S. citizenship stemming from the influence of those holding a substantial interest in the company...."[77] In DOT's view, ownership of 10 percent or more of voting stock "represents at least the potential for significant influence on a carrier's operations."[78] Noting that the "great majority of the carriers whose fitness the Department monitors are not large or publicly held," DOT found that "requiring carriers to report ownership interests amounting to less than 10 percent would be overly burdensome without providing a concomitant benefit for the Department's fitness purposes."[79]

42 Other federal agencies use benchmarks higher than 10 percent to trigger certain regulatory requirements. Section 7A of the Clayton Act imposes premerger notification and waiting period requirements on certain corporations planning to consummate large mergers

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[74] See 14 C.F.R. § 204.5.

[75] See 14 C.F.R. § 204.2(n)(3).

[76] See 14 C.F.R. § 204.3(g).

[77] Final Rule, 57 Fed. Reg. 38761, 38763 (August 27, 1992).

[78] Notice of Proposed Rule Making, 56 Fed. Reg. 27696, 27699 (June 17, 1991). DOT also cited as support for its 10 percent benchmark a statutory provision, which is no longer in effect, requiring regulatory approval of certain air carrier mergers. Id.; 49 U.S.C. App. § 1378. See also 49 U.S.C. App. § 1551(a)(7) (repealing provision effective January 1, 1989). This provision provided that "any person owning beneficially 10 per centum or more of the voting securities or capital, as the case may be, of an air carrier shall be presumed to be in control of such air carrier unless the [Civil Aeronautics] Board finds otherwise." Id. at § 1378(f).

[79] Final Rule, 57 Fed. Reg. at 38763.

and acquisitions.[80] These requirements are triggered when, among other things, the entity seeks to acquire 15 percent or more of a company's voting stock.[81] The purpose of these requirements "is to provide the [Federal Trade] Commission and the Department of Justice with information and time necessary to determine whether a proposed transaction, if consummated, may violate the antitrust laws."[82]

43. In addition, in comments filed in response to the Capital Formation Notice, Belo cites a financial reporting benchmark used by the Interstate Commerce Commission ("ICC") that is greater than 10 percent.[83] Under these ICC financial reporting guidelines, a railroad company must use "principles of equity accounting" in analyzing investments in voting stock of affiliated companies that give "the carrier the ability to significantly influence the operating and financial policies of an investee."[84] The ICC regulations go on to provide that an investment of 20 percent or more of the voting stock of an investee indicates such influence in the absence of evidence to the contrary.[85]

44. The strength of the analogy to other benchmarks will, of course, depend on whether the purpose of the particular benchmark in question parallels our objective in identifying ownership interests that confer on their holders the ability to influence the day-to-day operations of a licensee. Indeed, in our 1984 Attribution Order we declined to follow several of the regulatory benchmarks described above, finding that the purposes they served were inapt to the Commission's multiple ownership policies.[86] The Commission instead

[80] 15 U.S.C. § 18a.

[81] Id. at § 18a(a)(3)(A).

[82] See FTC v. Illinois Cereal Mills, Inc., 691 F.Supp. 1131, 1138-39 (N.D. Ill. 1988), aff'd, 868 F.2d 901 (7th Cir. 1989). See also H.R. Rep. No. 94-1373, 94th Cong., 2nd Sess. at 5-8 (reprinted in 1976 U.S.C.C.A.N. 2637).

[83] See Belo Comments at 11.

[84] See 49 C.F.R. § 1201.5-2(b)(1).

[85] Id.

[86] For example, with respect to the SEC's 10 percent "insider trading" benchmark and the Department of Transportation's air carrier regulations existing at the time, we stated in the Attribution Order, 97 FCC 2d at 1010, that the

> unifying characteristic of these rules is that they are intended to prevent intrinsically illegal or undesirable activities [such as collusive or anticompetitive behavior.] The levels of stock ownership which these rules variously identify as carrying an appreciable risk of permitting such activities

relied on what it found to be an especially analogous benchmark used for certain SEC reporting requirements; under these requirements, holders of 5 percent or more of the stock of a large, publicly-traded corporation must disclose certain information concerning the nature of their stock ownership.[87] We stated our belief that, as with our attribution rules, the SEC's 5 percent benchmark was "directed to identifying interests with the potential for significant influence or control."[88]

45. While we are not bound to follow another agency's ownership benchmarks, such benchmarks reflect Congressional or administrative judgments in a variety of contexts as to the correlation between different levels of ownership and the ability to influence or control an entity. Commenters should address, in detail, why a particular agency's benchmark may or may not be applicable, by analogy, to our analysis. We are particularly interested in whether the purposes underlying other regulatory benchmarks are comparable to our competition and diversity concerns, and why that agency believed the percentage it selected reflects a substantial enough interest to constitute the level of influence or control that implicates its underlying ownership limitation, and, in particular, whether its analytical methodology would be applicable to our rules.

46. We seek comment on how to devise rules that are consistent with the administrative concerns expressed in our section devoted to our underlying principles, see paragraphs 12 through 16, supra, and that would accommodate the principles reviewed in paragraph 17 supra. Should there be an exemption, similar to the single majority stockholder exemption, for stockholders in firms where management holds some threshold level of stock, on the ground that the inherent control afforded managers would preclude significant influence by other stockholders?[89] Can our stockholding benchmarks rely on, or take

> seem inappropriate models where, as here, the activity at issue -- influencing a licensee's programming decisions -- is not only legal but expected behavior by one with a legitimate investment interest in the licensee corporation.

[87] See Securities and Exchange Act § 13(d), 15 U.S.C. § 78m(d).

[88] Attribution Order, 97 FCC 2d at 1006-07.

[89] The influence of ownership of voting rights (who holds them and how many) and board composition on managerial and corporate performance is the subject of numerous studies on the "market for corporate control." See J. Weston, et al., Mergers, Restructuring and Corporate Control (1990) for a survey of this literature. Based on the data examined in these studies, it appears, first, that the composition of the board is an important determinant of control. Boards with more "outside" directors will likely behave differently than those with more "inside" directors. Second, the distribution of voting rights and who holds them is another factor in determining corporate control. Firms in which voting rights are concentrated in the hands of management will likely behave differently than those in which voting rights among shareholders are concentrated in an outside party (i.e., non-manager)

cognizance of the size of a stockholding relative to others in the firm? For instance, should we amend our attribution benchmark to consider whether a stockholder is, or is not, one of the larger or largest stockholders in a firm in determining attribution? We are initially concerned about the practicability of such a standard, however apt, as it appears to introduce uncertainty into the attribution framework. Under such a rule, whether a particular stockholder's ownership interest is attributed may change as a result not only of his own purchases and sales but also as a result of such transactions by others that are beyond his control. The best course of action may therefore be to retain our longstanding approach of basing our attribution benchmark on our best possible estimate of what level of stockholding is likely to be influential, balanced by our intent to avoid attributing interests that provide only a minimal risk of influence in order to encourage capital investment in broadcasting.

B. Voting Stock. Passive Investors

47. In the Attribution Order, we adopted a 10 percent attribution benchmark for certain institutional investors (bank trust departments, insurance companies, and mutual funds) that we deemed to be "passive" in nature in order to "increase the investment flexibility of these entities and, in so doing, expand the availability of capital to the broadcast and cable industries without significant risk of attribution errors."[90] We noted that these passive institutional investors generally invest funds on behalf of others, play passive investment roles, and are generally prohibited either by law or by fiduciary duties from becoming involved in the operation or control of the companies in which they invest.[91] To ensure that these institutional investors maintain a truly passive role in the affairs of the licensee, we require them to refrain from contact or communication with the licensee on all matters pertaining to the operation of its stations, and we prohibit such investors or their representatives from acting either as officers or directors of the licensee corporation.[92] Despite these considerations, in 1984, we declined to raise the passive investor attribution level above 10 percent. At that time, we were concerned that merely voting or trading such large blocks of stock might affect the management of a company, even if such results were inadvertent or unintended.[93]

Additionally, the statistical distribution of voting rights across shareholders influences the threshold at which the management or outside party holdings begin to control the firm.

[90] Attribution Order, 97 FCC 2d at 1013.

[91] Attribution Order, 97 FCC 2d at 1012-13.

[92] Attribution Order, 97 FCC 2d at 1013-14. Moreover, as an additional safeguard, each licensee is required to certify that no such investor has exerted or attempted to exert any influence or control over any of the affairs of the licensee. Id. at 1014; FCC Form 323 ("Ownership Report"), Instruction 6.

[93] Attribution Order, 97 FCC 2d at 1013.

48. In the Capital Formation Notice, we proposed increasing the passive investor benchmark from 10 percent to 20 percent.[94] The commenters who addressed this issue unanimously supported increasing the voting stock attribution level for passive investors.[95] The Investment Company Institute ("ICI") and most other commenters, for example, argued that in the case of passive investors, there is little cause for concern regarding the possible exertion of undue influence over licensees since such entities are passive by nature and are solely concerned with investing in companies, not controlling them. We are not, however, comfortable raising the benchmark based on the record thus far. We invite commenters to delineate what specific assurances we would have that passive investors that hold large stock interests cannot or would not exert influence or control over broadcast licensees and that raising the benchmark would therefore not exclude from attribution holders of interests that have a significant and realistic potential to influence station operations. Are there common factors, intrinsic to all passive investors, or institutional or other safeguards that could provide such assurance? Moreover, the comments do not, in our view, dispose of the concern we have raised regarding the impact on corporate decision-making that could result, even unintentionally, by the trading and voting of large blocks of stock by assertedly passive investors. We invite commenters to address the foundations of the Commission's concern about the possible effect of large stock trades and whether there have, in fact, been any stock transactions of this nature. If so, how substantial have such stock transactions been, and do the costs of the exclusion of such interests from attribution outweigh any potential benefits that might be realized from an increased attribution benchmark?

49. Additionally, while commenters argued that a higher attribution level for passive investors would significantly increase equity investment in the broadcast industry and would increase the availability of capital by giving passive investors greater flexibility with respect to broadcast investments, we seek additional comments on the degree of increased investment that would likely stem from any adjustment of our rules and on the need for such increased investment. Most commenters favoring increasing attribution levels, for example, contended that passive investment in broadcast entities is limited more by the Commission's attribution rules than by the financial resources available to such investors.[96] However, we would like

[94] Capital Formation Notice, 7 FCC Rcd at 2655.

[95] See Comments of CC Capital Corporation, a MESBIC ("CC"), National Association of Black Broadcasters ("NABOB"), National Association of Investment Companies ("NAIC"), Minority Broadcast Investment Corporation ("MBIC"), Santarelli, Smith & Carroccio, a law firm ("Santarelli"), Belo, NAB, Great American, ICI and CIBC.

[96] In this regard, we note that Great American stated that under our current attribution rules, increased broadcast investment triggers "burdensome" new FCC reporting obligations for additional attributable interests held strictly for investment. There is no further explanation as to why this alleged burden is significantly or directly responsible for any lack of investment in broadcast properties. Parties may wish to provide more information in this regard. Moreover, we emphasize that any increase in the current attribution levels, which

commenters to discuss in greater detail whether they think our present rules inhibit investment, and how modifications of our rules might encourage further investment.[97] investment, and how modifications of our rules might encourage further investment. Additionally, the commenting parties did not adequately address our concerns that any increase in these attribution levels not implicate our concerns about the potential for influence. We request additional empirical and other data, where appropriate, on the above issues. In commenting on the appropriate benchmark for passive investors, parties should continue to bear in mind the points and concerns raised in our section delineating our underlying principles. Finally, if the benchmark for all investors is raised to 10 percent, does that reduce any need there might be to facilitate broadcast investment by increasing the passive investor benchmark?

50. Several commenters raised a closely related issue not discussed in our Capital Formation Notice. They requested us to further expand the passive investor class to include other institutional investors, such as pension funds, investment and commercial banks, and certain investment advisors. Commenters indicated that such institutions invest solely for income and are not interested in influencing or controlling the management of the companies in which they invest.[98] We do not intend to revisit our decision of 1984 in order to broaden

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would result in expanding the class and nature of nonattributable interests, may require more reliance on disclosure to the FCC of such interests so that we have adequate information to be assured that our rules and policies are being met. We therefore ask parties to address with specificity the safeguards that will be necessary to ensure compliance with our rules without placing unreasonable or unnecessary burdens that may in fact impair further broadcast investment.

[97] For example, Great American stated that one of its passive institutional investors would make additional investments in other broadcast entities but for the restrictions placed by the current attribution rules. This, however, is too anecdotal and isolated to provide adequate guidance as to whether raising the benchmarks will result in a more across-the-board increase in the potential capital that might be made available to other broadcast entities. Moreover CIBC, although supporting an increase in the attribution levels, did not believe that it is the current rules that are responsible for undercapitalization of the industry as much as the fact that such investments are unattractive because of such factors as the volatile nature of broadcast revenues, both across and within individual markets; the rise of alternative advertiser-supported media such as cable; and that many markets have too many media outlets to support existing broadcast outlets. Neither of these commenters, however provided that type of detailed and specific data to enable us to assess how specific modification of the current attribution standards will directly result in increased broadcast investment. We invite comment on what specific attribution rules or other factors may be inhibiting broadcast investment and what specific rule changes might reverse any such problem.

[98] See Comments of Great American at 2; Reply Comments of CIBC at 3

the category of passive investors to include such entities.[99] However, we invite commenters to explain why this tentative conclusion is incorrect. Similarly, we are not prepared to expand the category of passive investors to include Small Business Investment Companies ("SBICs") and Specialized Small Business Investment Companies ("SSBICs"), formerly known as Minority Enterprise Small Business Investment Companies ("MESBICs"), as we proposed in the Capital Formation Notice. In the Capital Formation Notice, we reiterated our conclusion in the Attribution Order that these entities are not entirely passive in nature.[100] Under certain circumstances, these entities are authorized to exercise control over debtor companies for temporary periods.[101] We have received no evidence in the comments made thus far to alter our first conclusion that these entities do not meet our definition of "passive." In another proceeding initiated today, in MM Docket Nos. 94-149 and 91-140, we are, however, considering other rule changes to facilitate capital investment and entry by minorities and women without broadening our definition of "passive" investors.[102]

C. Minority Stockholdings in Corporations with a Single Majority Shareholder

51. Minority voting stock interests held in a corporate licensee are not attributable if there is a single majority shareholder of more than 50 percent of the corporate licensee's outstanding voting stock.[103] In adopting this rule in 1984, the Commission reasoned that in this situation minority interest holders, even acting collaboratively, would be unable to direct

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[99] The Commission declined to afford passive status to investment advisors because: (1) such status is unnecessary where an investment advisor does not have the power to vote the stock it holds or direct its disposition because it is then treated as any other custodial holder, that is, ownership is not attributed to it; and (2) where an investment advisor votes the stock, the Commission was not convinced that such advisors were passive in nature. It also noted that it would consider waiver requests from investment advisors seeking nonattribution of their interests. With respect to pension funds, the Commission also declined to afford passive status, finding that pension funds are not so consistently passive as to warrant relaxed benchmark treatment under the attribution rules, and noting evidence that pension funds were increasingly managing their own investments and actively pursuing social goals in their investment policies. Attribution Order, 97 FCC 2d at 1014-16 & n. 44. Further, while the Commission did not specifically mention investment and commercial banks, we have not been provided sufficient information here to conclude that such entities are truly passive in nature

[100] 7 FCC Rcd at 2656.

[101] Attribution Order, 97 FCC 2d at 1016 & n. 45.

[102] See Notice of Proposed Rule Making in MM Docket Nos. 94-149 and 91-140, FCC 94-323 (adopted Dec. 15, 1994).

[103] 47 C.F.R. § 73.3555, Note 2(b).

the affairs or activities of the licensee on the basis of their shareholdings.[104] We invite comment as to whether we should restrict the availability of this exemption. As discussed above, we are concerned that this exemption not be used to evade the multiple ownership limits. We are concerned that our prior conclusion that a minority stockholder could not exert significant influence on a licensee where there is a single majority stockholder may not be a valid conclusion in all circumstances. For example, we can conceive of circumstances in which the minority voting stockholder has contributed a significant proportion of the equity, holds 49 percent of the voting stock, and combines that holding with a large proportion of the nonvoting shares or debt financing. In such a circumstance, would that minority shareholder have the potential to influence the licensee such that the multiple ownership rules would be implicated? We invite comment on how we should approach our concerns in this area. Should we restrict the availability of the exemption? If so, should we do so on a case-by-case basis or restrict it in specified circumstances? If we should do so in specified circumstances, under what circumstances should we restrict the availability of the exemption?

D. Non-Voting Stock

52. Under our attribution rules, all non-voting stock interests (including most preferred stock classes) are generally nonattributable.[105] Non-voting stock provides significant benefits as an investment/capitalization mechanism: it specifically precludes the direct means (i.e., by voting) to influence or control the activities of a corporate licensee but allows investors to acquire sufficient equity to compensate for their risk. Moreover, non-voting stock which is convertible to voting stock is not considered to be a cognizable interest until such time as the conversion right is exercised. If the contingency upon which the conversion right rests is beyond the control of the stockholder, we determined that attribution is not appropriate because the shareholder has no apparent ability to control or influence the licensee corporation. However, even if the conversion right is within the shareholder's ability to effectuate, until the shareholder actually acquires the power to vote, the current rules presume that he should not be able to exercise impermissible influence or control over a licensee.[106]

[104] Attribution Order, 97 FCC 2d at 1008-09.

[105] See 47 C.F.R. § 73.3555, Note 2(f).

[106] Attribution Order, 97 FCC 2d at 1020-21. In this regard, the Commission observed that a "threat" to convert stock in order to vote on a corporate licensee's affairs would be an "empty gesture" if such conversion would result in the stockholder violating the multiple ownership rules, and, if no violation would result, reliance upon convertible non-voting stock to exert influence would not contravene the purpose of the multiple ownership rules. Additionally, under the current rules, the power to compel dividends or financial distribution attached to a non-voting interest is not viewed as conferring the power to influence or control a licensee in a manner contemplated by the multiple ownership rules, and therefore such

53. We invite comment on whether we should amend our attribution rules to consider nonvoting shares as attributable, at least in certain circumstances. We are concerned, for example, that a nonvoting shareholder who has contributed a large part or all of the equity of a corporate licensee may carry appreciable influence that is not now attributed. While such a shareholder could not vote formally on issues, it may deny reality to presume that such a shareholder would not seek the means to potentially influence the operations of the licensee to protect his investment and limit his risk. Since we are not aware of the identity of such shareholders, and licensees are not currently required to file with us all agreements with such shareholders that might affect the operations of the licensee,[107] we are concerned that there may be a gap in this area. We invite comment as to these issues.

54. If we decide to attribute nonvoting shares, should we do so only, as discussed below, where substantial equity holdings are held in combination with other rights, such as some voting shares or contractual relationships? If we decide to attribute nonvoting shares without reference to the existence of other contractual relationships, should we adopt a separate benchmark at the same level as we apply either to voting shares or to "passive" investors? We tentatively believe that we should, if we decide to attribute nonvoting shares, adopt a benchmark at least as high as that applied to "passive investors" since there is a common assumption of less potential for influence or control in both instances. Alternatively, should we establish a separate benchmark for nonvoting shares? If we establish a distinct benchmark for nonvoting shares, what should that benchmark be? While we are not inclined to proceed on a case-by-case basis, because of the administrative burdens imposed by such an approach, would those burdens be outweighed by other factors? We invite information on and analysis of the treatment of nonvoting shareholders in other attribution rules we administer and whether these rules are relevant in the broadcast multiple ownership context.[108]

powers will not change the noncognizable nature of such non-voting interests. Id.

[107] See 47 C.F.R. § 73.3613 (describing the contracts that must be filed by licensees). One way to address this concern is by amending our reporting requirements to include all shareholder agreements, at least as an interim measure, and we invite comment on such an approach.

[108] We attribute nonvoting stock in different ways in other services, depending on the particular context. In all the cases discussed below, unless expressly noted, we use a five percent benchmark. As discussed more fully in the text, supra, we consider a corporation's total equity to determine whether certain entities are affiliates of cable operators in the cable ratemaking context and to determine cable cross ownership with video programmers, MMDS and SMATV. In video dialtone cross-ownership between the carrier and the video programmer, we also look at the overall ownership interest in a corporation's outstanding stock, whether voting or nonvoting. In the context of the broadband and narrowband PCS multiple ownership rule, our benchmark is based on the equity, outstanding stock, or outstanding voting stock. We use a 20 percent benchmark in the context of the

VI. Partnership Interests

55. We generally attribute all partnership interests, except for sufficiently insulated limited partnership interests, regardless of the degree of equity holding, because we determined that the power and responsibility of partners to collectively or individually conduct the affairs of the partnership was a significant enough relationship to attribute ownership.[109] There is no apparent controversy regarding our rule to attribute all general partnership interests, and we do not intend to revisit that rule. We currently exempt from attribution those limited partners that are sufficiently insulated from "material involvement," directly or indirectly, in the management or operation of the partnership's media related activities, upon a certification by the licensee that the limited partners comply with specified insulation criteria.[110] Limited partnership interests that are not insulated are attributable regardless of the amount of equity held. We seek comment on the effectiveness of our current insulation criteria for limited partnership interests. Are additional insulation criteria necessary to assure that the goals of the attribution rules are achieved? Or, to the contrary, should the insulation criteria be relaxed to any degree, at least in certain circumstances, to attract increased capital investment or encourage new entry, and can this be done without implicating the purposes of the multiple ownership rules to encourage diversity and

SMR/cellular/broadband PCS spectrum aggregation limits, also based on the equity, outstanding voting stock, or outstanding nonvoting stock of any of these entities.

[109] Attribution Order, 97 FCC 2d at 1022-23.

[110] These "insulation criteria" include the following: (1) The limited partner cannot act as an employee of the partnership if his or her functions, directly or indirectly, relate to the media enterprises of the company; (2) The limited partner may not serve, in any material capacity, as an independent contractor or agent with respect to the partnership's media enterprises; (3) The limited partner may not communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its business; (4) The rights of the limited partner to vote on the admission of additional general partners must be subject to the power of the general partner to veto any such admissions; (5) The limited partner may not vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction or is removed for cause as determined by a neutral arbiter; (6) The limited partner may not perform any services for the partnership materially relating to its media activities, except that a limited partner may make loans to or act as a surety for the business; and (7) The limited partner may not become actively involved in the management or operation of the media businesses of the partnership. See Attribution Reconsideration, 58 RR 2d at 618-20, on recon., 1 FCC Rcd at 802-03. Further, pursuant to 47 C.F.R. § 73.3555, Note 2(g)(2), "[i]rrespective of the terms of the certificate of limited partnership or partnership agreement, however, no such certificate shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners in the management or operation of the media-related businesses of the partnership."

competition? If relaxation is justified, in what ways should the insulation criteria be relaxed?

56. Business Development Companies and Other Widely-Held Limited Partnerships. In the Capital Formation Notice, we proposed to relax insulation criteria with respect to business development companies organized as limited partnerships.[111] Because these limited partnerships contain features that may conflict with our insulation criteria, based on federal and state securities regulatory requirements, our current rules may inhibit their use. Most importantly, under both federal and state regulatory schemes, limited partners in business development companies must be afforded the right to vote on the election and removal of general partners. The Commission's insulation criteria, in contrast, require the absence of such rights (in conjunction with other insulation criteria) to support a presumption that the limited partners are sufficiently insulated from material involvement of the media-related activities of the partnership.[112] We therefore requested comment on whether we should relax the insulation criteria applicable to these widely-held limited partnerships so as to eliminate, as much as possible, the current conflict with state and federal securities laws.[113] Alternatively, we asked whether we should combine an equity ownership standard specific to these partnerships with a more limited relaxation of specific insulation requirements.

57. In the Capital Formation Notice, we also asked for comments on whether we should modify the insulation criteria applicable to all "widely-held" limited partnerships to recognize insulation where limited partners hold an insignificant percentage of the total interests in the partnership. We asked whether a 5 percent or other ownership benchmark would be appropriate in certain circumstances.

[111] Business development companies are a special class of business investment vehicle organized for the purpose of providing transitional and intermediate financing, as well as management assistance, to small and medium-sized companies. These investments are restricted to ensure that such investment companies provide capital to developing or financially troubled companies. Such companies are structured as limited partnerships to take advantage of favorable tax treatment accorded them by the Internal Revenue Service, are regulated under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 et seq., and are also subject to the securities laws of each state in which such partnership interests are offered or sold. See Capital Formation Notice, 7 FCC Rcd at 2656-57.

[112] See Capital Formation Notice, 7 FCC Rcd at 2656-57.

[113] The Capital Formation Notice referenced, and sought comment on, two petitions, one filed by Kagan Media Partners and the other filed by Equitable Capital Management Corporation, seeking declaratory rulings on the provisions of certain limited partnership agreements which admittedly do not comply with the current insulation criteria, but which, according to the petitioners, sufficiently insulate the limited partners from any material involvement in the partnerships' media holdings such that those interests should nevertheless be deemed nonattributable. 7 FCC Rcd at 2656. Comments received on the issues raised by the petitions are summarized infra.

58. We have received comments on the issues raised in the Capital Formation Notice. Several parties filed comments in favor of a modification of the Commission's insulation criteria with respect to widely-held limited partnerships and business development companies organized as widely-held limited partnerships to make Commission policy consistent with state and federal securities laws applicable to such entities by allowing limited partners to elect or remove general partners. They argued that allowing these specific voting rights will not result in limited partners of these entities becoming materially involved in the affairs of the partnership in light of the facts that: (1) the Commission would retain other existing insulation criteria which restrict the ability of limited partners to become materially involved in the operations of the partnership's media investments; and (2) the widely-held nature of the limited partnerships involved make it almost impossible that the limited partners could use their voting rights to exercise control over the general partners.

59. These commenters generally believed that widely-held limited partnerships possess characteristics that distinguish them from other investment vehicles and will ensure that limited partners will not be materially involved in station operations. Thus, they believe that widely-held limited partnerships should be subject to a distinct benchmark, or, in the alternative, should be completely exempt from attribution.[114] They also argued that the insulation criteria should be amended for all limited partnerships, regardless of size, to allow non-insulated limited partners (without regard to whether the partnership is widely-held) to hold equity interests below 20 percent without attribution. In this regard, Prudential Insurance Company of America ("Prudential")[115] noted that, although business development companies and widely-held limited partnerships are relatively new forms of investment vehicles, the choice of business organization -- corporation or partnership -- is determined based on tax considerations, not on the degree of participation or influence sought to be acquired. Thus, Prudential claims that either organizational form can be constructed to incorporate the desired level of influence. Prudential further maintained that there is no material difference in the participation and/or voting power of a 20 percent limited partnership interest and a 20 percent voting stock interest, and that this is true whether or not the partnership interest or the stock is in a widely-held or closely-held organization.[116]

60. We seek additional comments in this area. In particular, we would like updated information and additional empirical information on the growth and prevalence of business development companies and widely-held limited partnerships as investment vehicles generally, as well as applied to the broadcast industry in particular, including the percentage of equity typically represented by their investment. In this regard, it will be helpful for commenters to discuss with specificity the operation of business development corporations and widely-held limited partnerships and whether the existing insulation criteria have hindered capital flow from these entities to licensees. We note, however, that we do not intend to revisit our previous decision to attribute all general partnership interests without reference to an ownership benchmark.[117]

61. We ask parties to address the standards that could be used to define widely-held limited partnerships eligible for application of any revised insulation criteria. We specifically seek comment on whether there is anything inherent in the nature of state or federal regulation of business development companies that would insure that they remain widely held and whether such a guarantee, if it exists, is an adequate substitute for any of our current insulation criteria. Parties may also wish to offer additional suggestions for defining widely-held limited partnerships that reflect our concerns that such entities be used exclusively for investment purposes.

62. We also seek additional information, supported by empirical data, on whether we should revise our decision, on reconsideration of the Attribution Order, not to adopt an equity benchmark for noninsulated limited partnerships. In that decision we determined that an equity benchmark should not apply to limited partnerships because, among other reasons, the powers of a limited partner are not necessarily dependent upon the extent of his or her equity holdings. Further, the partners in a limited partnership largely have the power themselves to determine the rights of the general partners, and these may therefore vary in terms of whether they may participate in partnership affairs. Based on these factors, the Commission decided to apply insulation criteria to limited partnerships, instead of applying an equity benchmark.[118] We are not inclined to change this approach based on the record compiled thus far. If parties disagree with this conclusion, they must provide us with more data and analysis to demonstrate that our earlier decision is no longer valid or effective.

63. In this respect, we seek information on the financial and legal structures of limited partnerships to enable us to determine whether there is a uniform equity level below

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[114] Some commenters did not believe that there is any reason for distinguishing business development companies organized as limited partnerships from other widely-held limited partnerships for purposes of applying the insulation criteria. They maintained that nothing inherent in the regulation of a business development company results in its limited partners being further insulated from material involvement in the affairs of the partnership than limited partners in other widely-held limited partnerships.

[115] Prudential Comments at 11-12.

[116] Prudential Comments at 12. In addition, Belo stated that the typical individual investment interest held in widely-held limited partnerships is typically less than 1 percent of total equity. Moreover, unlike the structure of a conventional corporation, Belo stated that widely-held limited partnerships generally do not require annual meetings and limit limited partners to the election or removal of general partners (subject to the requirements of particular state or federal laws). Thus, it believed that these structural considerations limit the ability of limited partners, either individually or collectively, to exert influence or control over the affairs of the limited partnership. Belo Comments at 16-27.

[117] Attribution Order, 97 FCC 2d at 1022.

[118] Attribution Further Reconsideration, 1 FCC Rcd at 803-04.